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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-268

ANNA MAE SCHOTT,

Petitioner

v.

CITY OF KINGMAN, an incorporated Arizona municipality

PETITION FOR A WRIT OF CERTIORARI AND MOTION TO VACATE THE JUDGMENT BELOW TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August, 1972

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The Petitioner, Anna Mae Schott, prays that a writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on

May 25, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 13 - 17 . The opinion of the United States District Court, 317 F.Supp. 427 (D. Ariz. 1970), appears at Appendix B, infra, pp. 18-25.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 25, 1972. See Appendix A, p. 13 , infra. Rehearing was denied on June 27, 1972. See Appendix A, p. 17, infra. The jurisdiction of the Court is invoked under 28 U.S.C., Section 2101(c).

QUESTIONS PRESENTED

Whether the refusal of the Court of Appeals to follow the decision of the highest court of Arizona, in all material respects comparable to the present case,

departs from the directives of this court in a line of cases commencing with Erie R. Co. v. Tompkins.

Whether the decision of the Court of Appeals constitutes a decision on an important state question in a way that is in conflict with applicable Arizona law.

Whether the refusal of the Court of Appeals to remand for specific findings of fact regarding the existing Arizona law deprived petitioner of her right to rely upon the written opinion of the highest court of the State of Arizona.

Whether there is an affirmative duty imposed upon the Court of Appeals to ascertain from all available data what the state law is prior to reversing a District Court finding that a decision of the highest court of that state is controlling.

Whether the inclusion on the panel of judges from other circuits in an Erie R. Co. v. Tompkins case deprives petitioner

of her rights and is contrary to the stated policy of this court.

Whether the Constitution of The United States requires that petitioner, and other litigants in similar circumstances, be afforded more than a minimal chance of being heard in this court.

STATEMENT OF THE CASE

Petitioner, a resident of California, brought suit in the United States District Court for the District of Arizona to recover the reasonable value of water distribution lines installed in subdivisions adjacent to the City of Kingman, Arizona, and turned over to that municipality. These water lines were installed according to specifications required by the City of Kingman, including a requirement that certain portions of the system be a much larger size of pipe than was required by petitioner's lots in order to facilitate

future extensions of the system by the City of Kingman.

The District Court made extensive findings of fact and concluded that the Arizona Supreme Court had previously announced the law of Arizona as requiring reimbursement for this use of the water lines "notwithstanding the fact that there had been no express contract between the parties, either oral or written, in regard to the use of the property or the amount paid therefor." Paar v. City of Prescott, 59 Ariz. 512, 130 P.2d 40 (1942) at 130 P.2d 42.

A petition for rehearing, wherein petitioner alleged that the assumptions made by the Court of Appeals were inconsistent with the records in the Paar case, supra, was denied.

REASONS FOR GRANTING THIS WRIT

The opinion of the Circuit Court

represents a grave challenge to the rights of litigants in federal diversity cases by reinstating, at least in the Ninth Circuit, the possibility that a "general law" will be invoked if the particular state law in question is deemed "anomalous." Thus, the case does not just concern one elderly woman and her right to receive approximately Twenty-Five Thousand Dollars, but instead casts doubt on the consistent application of Erie Railroad Co. v. Tompkins, 304 U.S. 78, 58 S.Ct. 822, 82 L.Ed. 1188, when the state law in question represents the "minority rule."

Further, the decision below raises important and substantial questions as to the duty of inquiry imposed upon the appellate courts by this Court's prior opinions. In West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, after stating that the highest court of the state is the final arbiter

of what is state law, the court appeared to create an affirmative duty upon the appellate court. Specifically, this duty was to ascertain in every case what the state law is and apply it and not to prescribe a different rule even if it appeared to be superior. The decision below is squarely in conflict with this duty.

The decision also represents a substantial change in the rights of all landowners in Arizona who decide to develope their property. Many, like the petitioner, have acquired subdivisons by virtue of a forfeiture and are not experienced real estate promoters. The Arizona Supreme Court extended these people the protection of equitable relief. The Court of Appeals has now taken this right away.

In the decision the Court confesses that the record was incomplete with regard to what the state law was. Instead of

remanding or taking other measures to determine the extent of Paar v. City of Prescott, supra, it adopted a policy of assuming the state law did not apply to situations wherein a dedication was involved. Although the records of the Arizona Supreme Court demonstrate beyond any doubt that the Paar case, supra, involved dedications to the public, the Court of Appeals substituted its lack of knowledge on this matter in place of the Paar exhibits and other records on file at the Arizona Supreme Court. This petitioner, as well as all other citizens seeking relief through the federal court system, is entitled to more exact manner of determining the applicable state law.

This court has previously given great weight to the findings of the federal judge as to what the state law is when he is from that bar. In, Bernhardt v.

Polygraphic Company of America, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199, the court stated:

"Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is. See Mac Gregor v. State Mutual Life Assur. Co., 315 U.S. 280, 62 S.Ct. 607, 86 L.Ed. 846; Township of Hillsborough, Somerset County, New Jersey v. Cromwell, 326 U.S. 620, 630, 66 S.Ct. 445, 451, 90 L.Ed. 358; Steele v. General Mills, 329 U.S. 433, 439, 67 S.Ct. 439, 442, 91 L.Ed. 402. We agree with him that if arbitration could not be compelled in the Vermont courts, it should not be compelled in the Federal District Court. Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of Vermont law.

But, as we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule. We see no reason, therefore, to remand the case to the Court of Appeals to pass on this question of local law."

Judge Craig is a long standing member of the State Bar of Arizona, while none of the three judges on the Court of Appeals are members of this bar and one is from a different circuit.

Finally, this petitioner raises the question whether mere volume, as opposed to a meritorious question or questions of law, should act to deprive a litigant from final review by this court. If this

cause had been tried in the state court system both intermediate and supreme appellate review would have been available. Petitioner questions the constitutionality of the practice of, in effect, designating the Court of Appeals the court of last resort in most diversity cases. This practice was neither intended nor contemplated in the Constitution of the United States, U.S.C.A. Const. Art. 3, Sections 1 and 2.

CONCLUSION

Certiorari should be granted to review and correct a decision that is in conflict with numerous opinions of this Court, summarized in C.I.R. v. Estate of Bosch, 387 U.S. 46, 87 S.Ct. 1776, 18 L.Ed 2d 886, which have held that judicial decisions of the highest state court are laws which must be regarded as the rule of decision in civil actions in the federal courts.

For the reasons stated, this Court should forthwith reverse the judgment of the Court of Appeals and reinstate the judgment of the district court as being consistent with the law of the highest state court.

In the event the Court determines that the Court of Appeals has not performed its duty to ascertain the applicable state law and that the cause must be remanded to correct this situation it is requested the directive of this court limit the inquiry to the application of the state law to a system which is installed in an area dedicated to the public.

Respectfully submitted,

Robert John Walton

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANNA MAE SCHOTT,

Plaintiff-Appellee,

vs.

CITY OF KINGMAN, an incorporated Arizona municipality; HERB SHIPLEY, City of Kingman Engineer; L. I. RAKE, City of Kingman Clerk;

THE COMMON COUNCIL OF THE CITY OF KINGMAN, ARIZONA,

Defendants-Appellants.

No. 26,862

[May 25, 1972]

On Appeal from the United States District Court for the District of Arizona

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Before: WEICK,* HAMLEY and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

The question presented in this diversity case is whether, under Arizona law, a subdivider of property adjacent to a city who installs a water system in satisfaction of a state-imposed condition to the right to sell subdivision lots, which system is then connected to the city system, can thereafter recover from the city the cost of such installation. The district Court held that she could. Its findings of fact, conclusions of law and judgment are reported, *Schott v. City of Kingman*, 317 F.Supp. 427 (D. Ariz. 1970). We reverse.

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*Honorable Paul C. Weick, United States Circuit Judge for the Sixth Judicial Circuit, sitting by designation.

From 1962 through 1965 appellee and her late husband developed two subdivisions outside the city limits of Kingman, Arizona, in the course of which water distribution lines were installed under the subdivision streets.[1] The District Court found:

> "At the time of installation of the water lines there was no approved water supply other than that afforded by the City of Kingman. Furthermore, the State of Arizona required that water must be made available before plaintiff's lots could be sold. Plaintiff and her husband were aware of this requirement.
>
> The water lines were laid in the streets and followed minimum specifications required by the City of Kingman in accordance with the standards of the State Health Department. • • •
>
> Subsequent to installation of the water lines, the system was turned over to the City of Kingman for maintenance. • • •
>
> Subsequent to turning the water lines over to the City of Kingman for maintenance, a written demand for compensation was made by plaintiff and refused by defendant City of Kingman." 317 F.Supp. at 428.

Arizona law contains the usual requirements for city and county approval of subdivisions adjacent to city limits and the recording of approved plats. Ariz.Rev.Stat. §§9-474—9-479 (West 1956), as amended by 1958 Ariz. Laws Ch. 81, §1. Further, it provides:

> "Upon the filing of the plat or map, the fee of all streets • • • and other parcels of land reserved therein to the use of the public, shall vest in the public." Ariz.Rev.Stat. §9-477(C).

That the appellee took into consideration such state-required costs of subdivision in fixing the price of the lots seems apparent,

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[1]These water lines were not extended to individual lots. Purchasers of those lots were expected to pay the cost of attaching private lines to the water mains.

although her testimony was far from precise.[2] If she did not she was indeed ingenuous. But whether she did or not, the fact is that by dedication to the public she parted with all title to the streets and the underlying water mains and having, under compulsion of state law, dedicated them to the public in order to be able to sell subdivision lots, she cannot now recover their cost at public expense after having enjoyed the benefits and profits of dedication.

The District Court, however, felt that state law as announced in *Paar v. City of Prescott*, 59 Ariz. 497, 130 P.2d 40 (1942), compelled a contrary result. We disagree.

That case involved use by the City of Prescott, Arizona, of a water-supply system installed by Paar, the developer, in a proposed addition to the city. The court allowed recovery of the value of use of the system on the theory of unjust enrichment.

The case is indeed an anomaly. From the opinion we do not know how, under the state law applicable in 1927 (the date of the installation), Paar managed to avoid dedication to the public. All we know is that somehow he did and that he retained title to the water system which the city then used.[3]

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[2] "Q. When you sold these lots after you put the water main in, you expected to get some of your expenses back, didn't you?

A. Well, you had to get a little—what I mean, when you buy a piece of property, it is so much, and when you put in all the water mains and the streets and everything like that, you set a price."

The District Court found that the price of the lots had not been "increased" to absorb the cost of the water lines. This, however, was based on testimony with reference to specific raises in the price of the lots that occurred during the course of the sales program. Those raises had nothing to do with the water mains but were due to increases in value of the lots. The water mains were put in prior to the setting of the initial prices for lots.

Also instructive is the testimony of a Mr. Freiday, who performed the installation of the water system: "• • • it was brought up that [the subdividers] were going to have to get a certain amount of money out of lots • • • due to the cost of the water and grading of the streets." This was promptly contradicted by appellee's testimony only to the extent that she claimed to know of no conversation concerning "changes" or "increases" of lot prices.

[3] *Compare Moeur v. City of Tempe*, 3 Ariz.App. 196, 197, 412 P.2d 878, 879 (1966) (plat recorded with statement reserving to land company the right to laying and maintaining water mains).

Never once in the opinion is the question of dedication mentioned. But the description of the water system and the actions taken with reference to it are inconsistent with dedication.[4] Throughout the opinion the system is characterized as a "private water system." It was installed by William Paar after portions of the addition had been sold and when it became apparent that existing water supplies for the addition were insufficient. Connection of the private system with the city supply system was made at the city limits. The following year "Paar, the then owner of the private system, applied to defendant requesting that the city purchase his water system, and this matter was discussed from time to time but no formal action was ever taken thereon. The system was thereafter sold by William Paar to his son [the present plaintiff]." 59 Ariz. at 499-500, 130 P.2d at 41. The nature of the judgment also is revealing. It is not based on the city's acquisition of the water system, but rather recognizes that the plaintiff still retained ownership of it. The city was required to pay for the use of it at the rate of $750 a year for the three years preceding commencement of the action—the period of time not barred by limitations.

Thus in our view the case stands for no more than this: When a city in delivering water at a price makes use of privately owned property it must make restitution for the value of that use. We have concluded that this principle is not applicable in the case before us.

Judgment reversed.

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[4] *Compare City of Scottsdale v. Mocho*, 8 Ariz.App. 146, 151-52, 444 P.2d 437, 442-43 (1968); *City of Flagstaff v. Babbitt*, 8 Ariz.App. 123, 133, 443 P.2d 938, 948 (1968).

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CLERK

ANNA MAE SCHOTT,

Plaintiff-Appellee,

vs.

CITY OF KINGMAN, an incorporated municipality; HERB SHIPLEY, City of Kingman engineer; L. I. RAKE, City of Kingman Clerk; and THE COMMON COUNCIL OF THE CITY OF KINGMAN, ARIZONA,

Defendants-Appellants.

No. 26,862

On Petition for Rehearing

Before: HICK, HAMLEY and MERRILL, Circuit Judges

Appellee's petition for rehearing herein is denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ANNA MAE SCHOTT, Plaintiff,	)	No. Civ-1867 Pct. WEC
vs.	)	
CITY OF KINGMAN, an incorporated municipality; et al., Defendants.	)	FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

Plaintiff, a resident of California, seeks to recover reimbursement for expenditures incurred in the construction of water lines which defendant, an incorporated municipality and a subdivision of the State of Arizona, is presently using to deliver water to individual users. Plaintiff prays for the reasonable value of the water lines under a theory of implied contract, or alternatively, unjust enrichment.

This Court's diversity jurisdiction is invoked under Title 28 U.S.C. §1332. The claim is in excess of $10,000.

This matter was tried before the Court without a jury on June 19, 1970, in Prescott, Arizona. The matter was submitted for decision pending receipt of the parties' respective memoranda. The memoranda have been received and studied. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff and her husband [1] installed, during the years 1962-1965, water distribution lines in two subdivisions in Mohave County, Arizona, which are known as Shangri-La Estates and Kingman Country Club Addition.[2]

2. Shangri-La Estates and Country Club Addition lie outside the city limits of the City of Kingman, or at least they did for the time periods relevant herein.

3. At the time of installation of the water lines there was no approved water supply other than that afforded by the City of Kingman. Furthermore, the State of Arizona required that water must be made available before plaintiff's lots could be sold. Plaintiff and her husband were aware of this requirement.

4. The water lines were laid in the streets and followed minimum specifications required by the City of Kingman in accordance with the standards of the State Health Department. These specifications included a requirement that certain portions of the system be a larger size than was needed for plaintiff's lots in order to facilitate future extension of the system by the City of Kingman. The City Engineer of the City of Kingman inspected the work to insure compliance with specifications, but the actual supervision of the construction was performed by the general contractor responsible for installation of the water lines.

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[1] George F. Schott, originally a party to this lawsuit, died testate. The estate, including all after-discovered property belonging to decedent, has been distributed to plaintiff as her sole and separate property.

[2] For the purposes of this lawsuit, as it relates to Shangri-La Estates, plaintiff claims only the reasonable value of the water lines pertaining to blocks 7 and 8.

5. Subsequent to installation of the water lines, the system was turned over to the City of Kingman for maintenance. Accordingly, the city considered the lines to be part of the city's water distribution system and further considered ownership of the lines to be in the city. Defendants never inquired as to the cost of installing the lines, nor have the lines been carried by the city as an asset.

6. Subsequent to turning the water lines over to the City of Kingman for maintenance, a written demand for compensation was made by plaintiff and refused by defendant City of Kingman.

7. No written agreement exists between plaintiff and defendant City of Kingman concerning the payment of any sum for the installation of the water lines. Although plaintiff testified that she and her late husband thought they "should be" compensated for their expenditures, there is no evidence to indicate that defendants told plaintiff that the latter would be compensated, or that the city actually intended to reimburse them, or that plaintiff and her husband really anticipated reimbursement at the time the water lines were installed. The most that the evidence shows is that after the water lines had been installed plaintiff and her husband felt that the City of Kingman should be responsible for installing the lines and they so informed the city through its employees.

8. The evidence indicates that the sales prices of the lots in Shangri-La Estates and Country Club Addition were not increased to absorb the cost of the water lines.

9. The out-of-pocket cost to plaintiff and her husband of installing the water distribution system at Shangri-La Estates and Country Club Addition was $21,706.33. Plaintiff has also claimed as a part of the value of the system the supervision provided by herself and her husband. The value

of these services is alleged to be $10,000. However, the testimony of the general contractor, Mr. Freiday, would indicate a value for these services in an amount far less than that claimed by plaintiff. The conflict is so substantial as to make any valuation by the Court a matter of pure speculation. For this reason the Court declines to value these services.

CONCLUSIONS OF LAW

1. Federal courts in diversity cases involving non-federal matters must follow state law in matters of substantive rights. Erie R. Co. v. Tomkins, 304 U.S. 67, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). "[F]or the purposes of diversity jurisdiction a federal court is 'in effect, only another court of the state.'" Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). See also Sherrill v. McShan, 356 F.2d 607 (9th Cir. 1966).

2. A federal district court in Arizona applies the substantive law of Arizona for a cause of action arising within Arizona. See Peterson v. Mountain States Tel. & Tel. Co., 349 F.2d 934 (9th Cir. 1965).

3. The controlling Arizona law in this matter is found in Paar v. City of Prescott, 59 Ariz. 512, 130 P.2d 40 (1942). In Paar the Arizona Supreme Court held that when a municipal corporation, acting in its proprietary capacity, makes use of a private water system constructed by another, it is liable for the reasonable value of the use of that property, "notwithstanding the fact that there had been no express contract between the parties, either oral or written, in regard to the use of the property or the amount paid therefor." 130 P.2d at 42.

The Court's statement of the facts in Paar relates a situation similar to the one before this Court.

Since the decision in Paar, supra, the Arizona Supreme Court has not had occasion to again express its opinion on the law in this area. Furthermore, the decision in Paar has not been subsequently explained, distinguished or clouded by dicta. In fact, the case has been cited as authority only once since it was decided and that occurred in an unrelated context. The legislature of the State of Arizona has not acted in a manner which undermines the force of that decision.

Defendant argues that Paar is not applicable to the situation herein. Defendant attempts to distinguish Paar from this cause because the court in Paar found that the plaintiff therein "owned" a private water system whereas the plaintiff herein does not "own" the water lines which were laid in streets dedicated to the public. Although the Arizona Supreme Court referred to the water system as "belonging" to Paar and being his "property", there is no indication from the statement of facts in the opinion that the water pipes therein were not also laid in the publicly dedicated streets of the subdivision. Moreover, the statement of facts in Paar taken as a whole would indicate that the Arizona Supreme Court was not grounding its decision on the illusive concept of "ownership" of the water pipes or the realty in which they were laid, but rather the unjust enrichment resulting when a municipal corporation benefits without giving compensation from another's construction of a water system outside of the city limits.

Defendant implies that the fact that Paar has been infrequently cited as authority since the date of decision renders it defective as authority for plaintiff's position herein. However, when a federal court in a diversity case is confronted with an older decision of the highest court of the state which has not been impaired by subsequent judicial

rulings or legislative activity, it is bound to adhere to that decision. Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956). It is not the function of this Court to anticipate what the Supreme Court of Arizona may do the next time it has the opportunity to rule on a case like Paar or the one herein. Barlow v. DeVilbiss Co., 214 F.Supp. 540, 543 (E.D.Wis. 1963). A federal district court is bound by the applicable state law even though there may be persuasive reasons for change. Seguros Tepeyac, S.A. Compania Mexicana de Seguros Generales v. Jernigan, 410 F.2d 718 (5th Cir. 1969); Bannowsky v. Krauser, 294 F.Supp. 1204 (D.Colo 1969).

Defendant further contends that this is an improper case in which to apply Paar because this is really a matter of "officious conferring of benefit." This contention is without any support in the evidence.

This Court is cognizant of the fact that in the usual subdivision development, wherein the water lines are installed by the developer and not the municipality, the developer will ordinarily recover his expenses by prorating the same over the lots affected, thereby raising the selling price of each lot. However, the evidence in this case indicated that plaintiff did not do that. Therefore, this Court is bound by the decision in Paar v. City of Prescott, supra.

4. In Paar, the Court allowed as damages the reasonable value of the use of the property by defendant. The evidence herein concerning this measure of damages, however, is insufficient. Moreover, plaintiff has requested only the reasonable value of the water system as completed plus an amount to cover the suprevisory work performed by plaintiff and her late husband. The uncontradicted evidence is that the out-of-pocket costs to plaintiff and her husband amounted

to $21,706.33. These costs may be recovered. However, the claim for damages attributable to supervisory efforts will be denied because there is an insufficient basis in the record to guide the Court in achieving a valuation that even approaches a semblance of an educated guess.

DATED this 12th day of October, 1970.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ANNA MAE SCHOTT, Plaintiff, vs. CITY OF KINGMAN, an incorporated municipality, et al., Defendants.	No. Civ-1067 Pct. WEC JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against defendants in the amount of $21,706.33, together with cost of suit incurred.

DATED this 12th day of October, 1970.

United States District Judge